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CPLR 3216: 45-Day Demand Inapplicable to Dismissal for General Delay

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shall be the same as in the supreme court," CPLR 3212 is made applicable to the Court of Claims.

In *Vern Norton,* the state argued that since Rule 13 of the Rules of the Court of Claims provides that the state is not required to responsively plead, and since, in fact, no answer had been served, the requirement of CPLR 3212 that issue be joined before summary judgment is awarded had not been fulfilled. However, the court noted that rule 13 also provides that the state is deemed to deny all the allegations of the claim. Therefore, issue is joined as required by CPLR 3212, without formal service of responsive pleadings and the plaintiff may move for summary judgment immediately after filing his claim.[68]

*CPLR 3216: 45-day demand inapplicable to dismissal for general delay.**

It appears that the controversy surrounding the interpretation of the 1964 amendment to CPLR 3216[69] has been finally settled by the Court of Appeals. In *Thomas v. Melbert Foods, Inc.,*[70] personal injury was alleged to have occured in October, 1960, and an action was commenced in June, 1962. The plaintiff failed

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[68] *Cf.* CPLR 3018(a).

*As this issue of the *Survey* was going to press, CPLR 3216 was repealed and replaced with an amended section, which, in part, reads: "(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays . . . or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

"(b) No dismissal shall be directed under any portion of subdivision (a) . . . and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with: . . . (3) The court or party seeking such relief . . . shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a notice of issue within forty-five days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within the forty-five day period will serve as a basis for a motion . . . for unreasonably neglecting to proceed."

While practical considerations prevent a full treatment of the repeal and amendment of 3216 in this issue, the next installment of the *Survey* will include a thorough discussion of the effect, if any, of this change upon the practitioner. It is important to note here, however, that the new section makes service of a written demand a necessary prerequisite both in cases of failure to proceed and in cases of failure to file a note of issue.

[69] See generally 7B McKINNEY'S CPLR 3216, supp. commentary 210 (1966); *The Quarterly Survey of New York Practice,* 41 ST. JOHN'S L. REV. 279, 312 (1966).

[70] 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967).

to submit to a physical examination requested by the defendant in March, 1963. No further action was taken. Finally, in February, 1965, without first making a demand for the plaintiff to file a note of issue, the defendant moved to dismiss for failure to prosecute. The appellate division, first department,[71] in accord with its prior holdings,[72] granted the motion.

On appeal, the plaintiff argued that the 1964 amendment to CPLR 3216 required the defendant to serve a forty-five day demand before moving for dismissal. If the plaintiff then complied by filing a note of issue, the motion to dismiss must be denied. It seems that the plaintiff requested too much. The Court had already ruled in *Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc.*,[73] that even if the plaintiff filed a note of issue within forty-five days of demand, a dismissal could nevertheless be granted because of the plaintiff's prior general delay. However, *Commercial Credit*, when considered with *Fischer v. Pan Am. World Airways, Inc.*[74] and *Salama v. Cohen*,[75] had indicated that the defendant must make the forty-five day demand before any motion to dismiss for failure to prosecute, even for general delay prior to the filing of the note of issue, could be granted. The *Thomas* Court held that this interpretation would force a defendant to make a meaningless demand before he could move for a dismissal on the grounds of general delay. Additional delay would also be caused by the plaintiff's meaningless compliance with the demand. The Court, therefore, refused to ascribe to the legislature the intent to establish such a superfluous procedure.

The majority found that the legislature recognized that the 1964 amendment could not be interpreted as requiring the forty-five day demand before *every* 3216 motion. The Court noted that the vetoed 1965 amendment was passed to specifically require the demand and, if the plaintiff complied with the demand, that the motion to dismiss may not be granted. Also, the governor's veto message had cited the disapproval of the amendment by the presiding justices of the appellate division of the second, third, and fourth departments as being "an unnecessary limitation on the discretion of the courts in dealing with neglected actions. . . ."[76]

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[71] Thomas v. Melbert Foods, Inc., 24 App. Div. 2d 714, 263 N.Y.S.2d 442 (1st Dep't 1966).

[72] See, *e.g.*, Roberts v. New York Post Co., 24 App. Div. 2d 714, 263 N.Y.S.2d 338 (1st Dep't 1965); Brown v. Weissberg, 22 App. Div. 2d 282, 254 N.Y.S.2d 628 (1st Dep't 1964); Mulinos v. Coliseum Constr. Corp., 22 App. Div. 2d 163, 254 N.Y.S.2d 282 (1st Dep't 1964).

[73] 17 N.Y.2d 367, 218 N.E.2d 272, 271 N.Y.S.2d 212 (1966).

[74] 16 N.Y.2d 725, 209 N.E.2d 725, 262 N.Y.S.2d 108 (1965).

[75] 16 N.Y.2d 1058, 213 N.E.2d 461, 266 N.Y.S.2d 131 (1965); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 340 (1966).

[76] 1965 N.Y. LEG. ANN. 551.

The majority believed that its construction preserved a broader judicial discretion.

The majority, however, made it clear that courts should not be bound by the defendant's characterization of his motion. Where the defendant moves to dismiss on grounds of general delay, a court, considering all the factors, may find that there has, in fact, been no general delay and that the defendant's only complaint is that the plaintiff has delayed in filing a note of issue. In such a case, a court could then deny the defendant's motion and require a compliance with the forty-five day demand provision of CPLR 3216.

The dissent argued that the intent of the 1964 amendment was clear; it was passed at the prompting of the plaintiff's bar to limit the discretionary power to dismiss for failure to prosecute, and not to provide that the failure to file a note of issue shall be an additional ground of dismissal. The 1965 amendment was interpreted as intending to confirm what the dissent felt to be the clear meaning of the 1964 legislation. The dissent believed that the majority's position rendered the 1964 amendment "a supererogatory provision, a meaningless and nugatory act, and indicates that the Court has usurped the law-making power reserved to the legislature." [77]

It is possible, as the dissent noted, that the majority resorted to a construction of 3216 which avoided a constitutional issue. In a lucid dictum in the last paragraph of *Commercial Credit*, the Court had stated that it was prepared to hold unconstitutional any interference with the inherent discretionary power of courts to control their calendars.[78] While this position has apparently lost the support of the dissenters, no similar language appears in the *Thomas* decision. However, the Court noted that its interpretation of the amendment preserves the "inherent power" and "the *right* of courts to dismiss in their discretion for general failure to prosecute. . . ." [79]

Although the constitution gives the legislature the power to "regulate . . . proceedings in law and in equity that it has heretofore exercised," [80] there is authority for holding legislation unconstitutional as infringing upon the inherent power of courts to control their calendars. In the 1904 case of *Riglander v.*

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[77] Thomas v. Melbert Foods, Inc., 19 N.Y.2d 216, 227, 225 N.E.2d 534, 539, 278 N.Y.S.2d 836, 843 (1967).

[78] Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc., 17 N.Y.2d 367, 373, 218 N.E.2d 272, 274, 271 N.Y.S.2d 212, 216 (1966).

[79] Thomas v. Melbert Foods, Inc., *supra* note 77, at 221, 225 N.E.2d at 536, 278 N.Y.S.2d at 839. (Emphasis added.)

[80] N.Y. CONST. art VI, § 30.

Star Co.,[81] the court invalidated a statute making calendar preferences mandatory,[82] stating:

> [W]hile the Legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised; and it has never before attempted to deprive the courts of that judicial discretion which they have been always accustomed to exercise.[83]

If courts have a power to control their calendars, it would seem they must also have inherent discretionary power to dismiss for failure to prosecute.

However the constitutional issue may have been decided, the Court chose not to base its decision thereon. Hopefully, the uncertainty caused by the 1964 amendment to CPLR 3216 has been ended so that the constitutional issue need never be decided.

CPLR 3216: Motion based on general delay.

While *Thomas v. Melbert Foods, Inc.*,[84] has established that a defendant may move for a dismissal for failure to prosecute without first serving the plaintiff with a forty-five day demand for filing a note of issue, some questions remain as to the weight of the factors which are to be considered in deciding a motion based upon general delay. In *Kasiuba v. New York Times Co.*,[85] the court has emphasized the defendant's contribution to and acquiescence in the delay.

In *Sortino v. Fisher*,[86] the most exhaustive survey of the various factors to be considered on a 3216 motion, the court noted that while there are exceptions, the duty to prosecute lies primarily with the plaintiff. While the court in *Kasiuba* agreed, it stressed that even though no duty is owed to the plaintiff, the defendant at least owes a duty to the court to press for dismissal of the action. In *Kasiuba* the defendant had waited two months before serving its answer and another fifteen months

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[81] 98 App. Div. 101, 90 N.Y. Supp. 772 (1st Dep't 1904), *aff'd mem.*, 181 N.Y. 531, 73 N.E. 1131 (1905).

[82] Code of Civil Procedure § 793, as amended by ch. 173, Laws of N.Y. 1904.

[83] Riglander v. Star Co., 98 App. Div. 101, 105, 90 N.Y. Supp. 772, 775 (1st Dep't 1904). See also Plachte v. Bancroft, Inc., 3 App. Div. 2d 437, 438, 161 N.Y.S.2d 892, 894 (1st Dep't 1957), wherein the court stated that "a statute which would impose a mandate upon the court in the otherwise discretionary handling of time of trial is unconstitutional."

[84] 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967).

[85] 51 Misc. 2d 700, 273 N.Y.S.2d 705 (Sup. Ct. Kings County 1966).

[86] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963); *A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 448 (1964).